**IN THE HIGH COURT OF BOMBAY AT GOA**

WRIT PETITION NO. 485 OF 2006

1. Shri Claudio Michael D'Souza,
   s/o late Francisco Xavier D'Souza,
   major of age, landlord;
   and his wife;

2. Smt. Nila D'Souza,
   major of age,
   housewife,
   r/o Parra, Bardez, Goa.

   Both are represented by their
   constituted attorney,
   Dahyabhai C. Patel,
   Major of age,
   r/o 104/A, Bldg B,
   Parra Tower, Jackni Parra,
   Bardez, Goa. .... Petitioners

versus

1. Smt. Esmaralda Fernandes,
   major of age, housewife,

2. Smt. Julie Fernandes,
   major of age, housewife,

3. Shri Lazaro Fernandes,
   major of age,

4. Shri Alex Fernandes,
   major of age,

5. Shri Anthony Fernandes,
   major of age,

6. Shri Agnelo Fernandes,
   major of age,

7. Smt. Sabina Fernandes,
   major of age,

8. Smt. Perpetua Fernandes,
   major of age,

9. Smt. Bernardine Fernandes,

major of age,

All at sr.no. 1 to 9 are
residents of Jacknim Wada,
Parra, Bardez, Goa.

10. Shri Jerry Noqueiria,
major of age, r/o H.No.65,
Jacknim Wada,
Parra, Bardez, Goa.

11. Ms. Maria Noqueria,
major of age,
r/o H.No.65/1,
Jacknim Wada,
Parra, Bardez, Goa.

12. Ms. Domnico Noqueira,
major of age,
r/o H.No.65/1,
Jacknim Wada,
Parra, Bardez, Goa. .... Respondents.

Mr. S.D. Lotlikar, Sr.Advocate with Mr. Marvin D'Souza, Advocate for the petitioners.

Mr. R.V. Kamat, Advocate for the respondents.

Coram:- J.N. PATEL, J.

Date:- 17th November, 2006.

ORAL JUDGMENT:

Rule returnable forthwith.

2. Heard.

3. It is submitted by the learned Counsel for the parties that the Writ Petition may be treated as an appeal under Order 43 Rule 1 (l) for the reasons that the application made by the petitioner/original

plaintiff was filed before the Trial Court for seeking amendment to the pleadings to bring subsequent development on record alongwith an application to join M/s JEF Constructions through their managing partner Mr. Dahyabhai C. Patel and Mr. Harshad Dahyabhai Patel which was sought to be carried out by way of amendment. The learned Trial Court by his Order dated 15.7.2006 partly allowed the application in so far as prayer for amendment of the pleadings was concerned and rejected the same for joining plaintiff no.3 and ordered that they may be joined as defendants and therefore according to the learned Counsel for the respondents/original defendants, the petitioner/original plaintiff ought to have preferred an appeal in the matter.

4. Considering the nature of the application at Exhibit 33 filed before the Trial Court and the relief sought, it does not preclude the petitioner/original plaintiff from impugning the order by invoking Article 227 of Constitution of India. Therefore the contention of the learned Counsel for the respondents/defendants, that this ought to have been treated as an appeal does not create any legal impediment in the way of the petition or in moving this Court under Article 227 of Constitution of India.

5. The petitioner/original plaintiff sought amendment and addition of parties under Order 22 Rule 10 for the reasons that the petitioners initially had undertaken construction activities over the suit

property owned by them which during the pendency of the suit has been conveyed in favour of M/s JEF Constructions a partnership firm represented by its partner vide Sale Deed dated 15.10.2004 and therefore they sought amendment to the plaint to incorporate this development as well as join the said firm as plaintiff no.3 alongwith its partner. This was supported by the consent placed on record on behalf of the proposed plaintiff no.3.

6. The defendant contested the application on the ground that this would amount to alteration in the pleadings of the plaintiff so as to change the cause of action and as consequence of which also place the defendant in a situation which would affect their counter claim and for which cause of action would also change. Another contention was at this stage, it is not permissible in law to add parties who were not parties at the time the cause of action arose. The learned Trial Court found favour with the contention raised by the defendant and partly allow the application for amendment to paragraph 1, 30, and 31 and permitted the petitioner to join the proposed plaintiff no.3 as defendant no.13.

7. The main reason for rejecting the application of the plaintiff to join the proposed plaintiff no.3 and carry out amendment as proposed in paragraph 5, 6, 9, 10, 11, 12, 17, 18, 19, 21, 24, 25, 26, 27, 28, 32, 33 and 34 appears to be relating to the cause of action as on the date the plaintiff filed the suit seeking relief of permanent

injunction against the defendants to restrain the defendants from interfering in the suit property of the construction or development made therein and that on the date the cause of action arose, the proposed plaintiffs were not in the picture.

8. It appears that the learned Trial Court proceeded on a wrong premises in disallowing the application for amendment so as to seek joining of proposed plaintiff no.3. It is to meet such contingency that Rule 10 Order 22 provides that in other cases of an assignment, creation or devolution of any interest during the pendency of a suit, the suit may, by leave of the Court, be continued by or against the person to or upon whom such interest has come or devolved. The very fact that the property has been sold by the plaintiff to the proposed plaintiff no.3, there was no reason why the Trial Court ought not to have permitted the plaintiff to join plaintiff no.3 who has now become owner of the suit property as the proposed plaintiff having purchased the suit property of which litigation is pending, steps into the shoes of the original plaintiff. Therefore the impugned order at Exhibit 33 is quashed and set aside. The petitioner/original plaintiff is permitted to join M/s JEF Constructions alongwith its partners as plaintiff no.3 and also incorporate the proposed amendment which has been rejected by the Trial Court under the impugned order.

9. The learned Counsel appearing for the respondents submitted that the respondents may be permitted to carry out

consequential amendment to the written statement. Needless to say that respondents/original defendants can very well apply to the Trial Court to carry out consequential amendment to meet the case of the plaintiff as now pleaded by way of amendment.

10. The petitioner shall carry out the necessary amendment within two weeks and file amendment copy of the plaint and furnish a copy of the same to the defendants.

11. Rule is made absolute in aforesaid terms with no orders as to costs.

J.N. PATEL, J.

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